

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To be argued by
RICHARD M. SHARFMAN

74-1915

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1915

HARRY S. SAMUELS,

Plaintiff-Appellant,

-against-

ARMSTRONG CORK COMPANY,

Defendant-Appellee.

Appeal from Part of a Judgment of the United States District
Court for the Southern District of New York

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Statement

Plaintiff-appellant Harry S. Samuels ("Mr. Samuels") submits this brief in reply to the answering brief of defendant-appellee Armstrong Cork Company ("Armstrong").

On November 7, 1974, subsequent to a filing of Mr. Samuels' main brief and Armstrong's answering brief, the trial court (Hon. Richard H. Levet), on Armstrong's motion ordered stricken from the record-on-appeal certain deposition transcripts referred to at pages 26 and 32 of Mr. Samuels' main brief (711-712)*. On December 17, 1974, on Mr. Samuels' motion pursuant to Fed. R. App. P. 10(e), this Court directed that such transcripts be included in a supplemental appendix (Supp. 1)*.

Argument

In his main brief Mr. Samuels has convincingly demonstrated (1) that the trial court's critical findings of fact were clearly erroneous because expressly based on an erroneous factual conclusion and either contrary to undisputed facts or without any record support of substance and (2) that the trial court misconstrued the law and the written agreement (the "Contract") between the parties. Instead of coming to

* References herein to the Appendix are made by page number. References to the Supplemental Appendix are made by page number preceded by "Supp.".

grips with that showing, Armstrong has blatantly distorted and mischaracterized the trial testimony, the law and the Contract in an effort to avoid the undeniable -- that on the undisputed facts, at the very least a new trial must be granted.

1. The Undisputed Facts.

Despite Armstrong's footnote statement (Armstrong brief, p. 5) that "many of the facts" which Mr. Samuels has characterized as undisputed "were actually hotly contested at trial", its brief does not, and indeed cannot, specify any such mischaracterizations. Instead, Armstrong has attempted to cloud the issue, ignoring the undisputed facts and emphasizing its own witnesses' testimony, even though that testimony cannot withstand review on this appeal in the face of facts which Armstrong does not question.

The following facts are either undisputed or, despite Armstrong's efforts to raise dust, indisputable:

(i) On the recommendation of Armstrong's banker, Mr. Samuels was sought out and retained as an acquisition expert expressly to aid Armstrong in acquiring furniture companies (Donnelly (363-65) Exhibits 22 (610-612) and 23 (613-614) for identification).

(ii) Prior to meeting Mr. Samuels, Armstrong had no knowledge that Thomasville Furniture Industries, Inc. ("Thomasville") was available for acquisition (Donnelly (369)).

(iii) Before execution of the Contract, Mr. Samuels advised Armstrong's senior management that Thomasville was available for acquisition. None of Armstrong's trial witnesses denied Mr. Samuels' testimony (64, 76, 129) that at their first meeting he advised Armstrong that Thomasville was available for acquisition. Armstrong does not and cannot contend otherwise on this appeal. Instead, it urges that Mr. Samuels did not "submit" Thomasville's name to it (Armstrong brief, p. 11). The argument is irrelevant as well as factually wrong. A finder's function is to advise about the availability of companies for acquisition. Under the law and the Contract, Mr. Samuels earned his finder's fee as a result of advising Armstrong that Thomasville, which it subsequently acquired, was available for acquisition.

(iv) There is no testimony or documentary evidence, admissible or otherwise, capable of supporting even an inference that Armstrong had, prior to retention of Mr. Samuels, ever considered Thomasville for acquisition. The only testimony advanced by Armstrong in that regard was on its direct examination of Max Banzhaf (277-278) (at all material times a vice-president of Armstrong and Chairman of its Acquisition Evaluation Committee's sub-committee for the furniture industry). Mr. Banzhaf, in response to a line of inquiry which started with the question, "Mr. Banzhaf, did you know anything about Thomasville Industries before you met Mr. Samuels", stated:

"I Knew about their size. I knew about the scope of their product line. I knew about their management. I knew how they were regarded in the industry". [The balance of his response was stricken] (277-278).

Such knowledge is analagous to the general awareness an executive in the automotive industry would have about the Goodyear Tire Company. In not the remotest sense is it evidence that Armstrong was considering, or had considered, Thomasville for acquisition before Mr. Samuels told Armstrong of the opportunity. And despite Armstrong's urging that it had studied Thomasville for acquisition before Mr. Samuels advised that it was available, the only documentary evidence offered consisted of four scraps of paper (Exhibits I, J, K and L (655-663)), three of which were clearly inadmissible* and all of which are irrelevant as evidence of prior consideration of Thomasville by Armstrong. In the absence of any such evidence, the testimony of James H. Binns (at the time of trial Armstrong's president) and Maurice J. Warnock (at the time of trial Armstrong's board Chairman) -- that when they first met Mr. Samuels they

* Armstrong's contention (Armstrong brief, pp. 29-30) that Exhibits I, J, and L were properly admitted as Armstrong business records, even though the authenticating witness did not know whether they had been prepared by Armstrong or had come from Armstrong's files, is bewildering. The plain result of the effort to authenticate the documents is that the witness did not know if they were a record of anyone's business, let alone Armstrong's. Nor is the conclusion that the documents were improperly admitted altered by reference to United States v. Dawson, 400 F. 2d 194, 198-99 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969); cited by Armstrong at page 30 of its brief. In that case, the authenticating witness knew that the documents were records kept in the regular course of business.

instructed him that Thomasville was to be excluded from the scope of Mr. Samuels' employment because (as Mr. Binns claimed he said) Armstrong "already had things going" with Thomasville (Binns (418)) -- is simply not susceptible of belief.

(v) Prior to Mr. Samuels' retention, Armstrong's only contacts with Thomasville had nothing to do with acquisition efforts, but were instead attempts to become a supplier of material to Thomasville. Despite Armstrong's effort to characterize its two pre-Samuels meetings with Thomasville (Armstrong brief, pp. 9-10) (the later of which was eight months prior to Mr. Samuels' retention and ten months prior to the first time Armstrong broached acquisition with Thomasville) as being acquisition-related, the record demonstrates that they were not. The first such meeting was with the Thomasville employee in charge of production, "essentially picking [his] brain" with respect to the furniture industry (309). The second was described by Thomasville's president (at the time of trial also a vice-president and director of Armstrong), Thomas A. Finch, Jr., as an effort by Armstrong to sell supplies to Thomasville (186, 215), during which "acquisition was not discussed" (188). Nor did that second meeting result in "friendly and personal terms" between Mr. Finch and Mr. Banzhaf of Armstrong as stated at page 28 of Armstrong's brief, citing Mr. Finch's supposed testimony at page 185 of the trial transcript (215). That transcript page,

as well as the entire trial record, is absolutely barren of any such characterization.

(vi) Armstrong in fact relied on an outsider to arrange the October 18, 1966 meeting with Mr. Finch at which it first broached acquisition. Armstrong's brief (p. 14) attempts to characterize its resort to an officer of the Wachovia Bank and Trust Company to arrange the October 18, 1966, meeting with Mr. Finch as a direct contact between Armstrong and Thomasville because the bank officer was a director of Thomasville. But reference to the trial testimony establishes the effort to be fanciful. The issue is whether, as the trial court erroneously concluded, there was any "direct relationship" (704) between officers of Armstrong and Mr. Finch such that Armstrong had no need for the services of an outsider to intercede with him. That no relationship, "direct" or otherwise, existed is established incontrovertably by the testimony of Frederick S. Donnelly, Jr., that, as Armstrong's treasurer, he arranged the October meeting "with the Bank" (375) and Mr. Finch's testimony that the "president of the bank" asked him to "meet some people" from Armstrong. Obviously, no one at Armstrong knew Mr. Finch well enough even to arrange a meeting. And just as obviously, the trial court's conclusion that a direct relationship existed - upon which conclusion it expressly based its rejection of Mr. Samuels' claims (704) - was absolutely wrong.

(vii) Mr. Samuels continually advised Mr. Donnelly about tactics for acquiring Thomasville (Donnelly (349-350); Samuels (83, 85-86); Exhibits 13 (590-592) and D (624-625)). The best that can be said about Armstrong's efforts (at pages 13-14 and 33 of its brief) to characterize such advice as an attempt by Mr. Samuels to discourage Armstrong from considering Thomasville is that it is absurd. The written advice relied on by Armstrong for the mischaracterization is contained as a post-script to Mr. Samuels' October 10, 1966 letter to Mr. Banzhaf (Exhibits 13 (590-592) and D (624-625)), and clearly states that Armstrong must be careful in revealing its plans to executives of the Wachovia Bank and Trust Company because of Mr. Finch's penchant for secrecy, "otherwise you might aborn [sic]" the acquisition. Armstrong's effort to turn this sage advice into something else is illustrative of its desperation on this appeal.

(viii) Armstrong terminated Mr. Samuels' contract immediately after Mr. Finch expressed concern about the involvement of a finder (Warnock (425-247); Banzhaf (259-260); Donnelly (324-326)). Despite Armstrong's urging that it decided to terminate the Contract with Mr. Samuels because "it was not getting any place" with him (Armstrong brief, p. 16), the facts (as described at pages 37-40 of Mr. Samuels' main brief) are (a) that the decision to terminate came on the heels of Mr. Finch's statement to Mr. Warnock on January 6, 1967, that

he did not want to deal with a finder and (b) that the termination letter expressed a desire to continue working with Mr. Samuels on a less formal basis. Since Armstrong owed Mr. Samuels nothing under the Contract unless it consummated an acquisition which he found, there was no bona fide reason for it to terminate the Contract if it contemplated a further relationship with Mr. Samuels.

2. The Law and the Contract.

Like its mischaracterizations and outright misstatements of the record facts on this appeal, Armstrong's brief (pp. 41-45), misstates the law governing recovery by finders and compounds the error by misconstruing the Contract between Mr. Samuels and Armstrong, just as the trial court did (705-706).

Armstrong's effort to distinguish away Simon v. Electro-space Corp., 32 A.D. 2d 62 (1st Dep't. 1969), modified, 28 N.Y. 2d 136 (1971) and Seckendorff v. Halsey, Stuart & Co., Inc., 234 App. Div. 61 (1st Dep't. 1931), rev'd on other grounds, 259 N.Y. 353 (1932), demonstrates the error in its and the trial court's legal conclusion.

Contrary to Armstrong's contention (Armstrong brief, p. 42), neither Simon nor Seckendorff involved finders who "produced parties ready and willing to perform . . . introduced the parties to the transaction and arranged and attended one or more meetings between the parties". In Simon, the plaintiff finder communicated an "inquiry" from someone who expressed

interest in acquiring the defendant corporation. Not only did the finder there, who was found to have earned a fee, not arrange any meetings but he "was not present at [the meetings which ensued] and was later advised that nothing had been concluded" (32 A.D. 2d at 64). And in Seckendorff, the transaction consummated involved a purchaser different from the one introduced by the plaintiff finder and properties which were not identical with those which the finder had revealed, yet a finder's fee was earned, the court observing:

" . . . Plaintiff was in nowise a broker. * * * He merely was a finder of this piece of business. He was to receive his compensation for finding the business and bringing the same to the attention of [the defendants]." 234 App. Div. at 70.

As the Seckendorff case makes clear, a finder's duties must be distinguished from those of a broker. Neither Armstrong's brief nor the trial court's conclusions of law recognize that distinction or its importance. Instead, both have relied upon two brokerage commission cases -- Sibbald v. The Bethlehem Iron Co., 83 N.Y. 378 (1881), and Duane v. Polk, 32 N.Y.S. 2d 568 (Sup. Ct. N.Y. Co. 1941) -- to deny a finder's fee to Mr. Samuels (Armstrong brief, p. 43; Opinion (705)).

The Sibbald and Duane cases hold that a broker undertakes "to bring the buyer and seller to agreement" (83 N.Y. at 381) or to "bring about an agreement of sale" (32 N.Y.S. 2d at 572). In Sibbald, a broker for the sale of steel rails was found not to have earned a commission, even though the customer actually

purchased rails from the defendant, because the purchase occurred three weeks following the good faith termination of bargaining through the broker. The court there held that the broker's duty of bringing the parties to agreement had not been fulfilled since the initial negotiations had broken off. Similarly, in Duane the plaintiff broker was denied recovery even though the works of art which he had attempted to sell eventually were purchased by the customer with whom he had unsuccessfully negotiated.

The different results in Sibbald and Duane, on the one hand, and Seckendorff and Simon on the other, reflect the difference in engagements between a broker and a finder. When one engages a broker, one contracts to pay a commission if the broker procures a "ready and willing" purchaser or seller, as the case may be, even though the transaction is not consummated. Sibbald v. The Bethlehem Iron Co., 83 N.Y. at 381. In contrast, one who engages a finder makes a much different bargain - he agrees to pay a fee if he takes advantage of an opportunity disclosed to him by the finder. Unlike the broker, a finder earns nothing unless his client goes through with the transaction. But, if the transaction is concluded, the fact that a finder's only participation was

to make the opportunity known is sufficient for compensation.*

Under the Contract, Armstrong retained Mr. Samuels to act as a finder "for the submission of, or other action with reference to, proposals involving companies for possible acquisition" by Armstrong (Contract, Introductory Paragraph (617)). Paragraph 2 of the Contract specifies that a fee is earned upon consummation of a "transaction, based upon an acquisition found" by Mr. Samuels. It is uncontested that Mr. Samuels disclosed to Armstrong the very opportunity for which it had sought his expert services and that the acquisition was made. Thus, the Contract sets forth the basic elements for compensating Mr. Samuels as a finder and it is uncontested that these elements were met. Since paragraph 3 of the Contract provides that after Mr. Samuels "submit[s] a proposition", Armstrong will "inform [him] of its interest, if any, therein and of any further action, such as supplying additional information or negotiation which we wish to have done with respect thereto", it is specious to argue, as Armstrong does

* Nor is Towers v. Dorowshaw, 5 Misc. 2d 241 (Sup. Ct. Onondaga Co. 1957), relied upon incorrectly by Armstrong (brief, p. 42), contradictory. The point of that case is that a finder's contract must be proven:

" . . . when such an agreement is not reduced to writing, the plaintiff must sustain his burden of establishing the contract by evidence of a quality and quantity sufficient to satisfy the court of a clear and unequivocal intention by the defendant to pay. . . ." 5 Misc. 2d at 249.

(Armstrong brief, p. 44) that Mr. Samuels was required under the Contract to be present during negotiations and attend the closing in order to earn his fee. If that were correct the Contract would be meaningless since Armstrong could, under Paragraph 3, inform Mr. Samuels of its interest in an acquisition candidate suggested by him and at the same time exclude him from a fee by advising him that it did not require any further action by him. Such a reading is at variance with the plain language of the Contract as well as common sense.

Moreover, Armstrong concedes that it was unaware that Thomasville was available (Donnelly (369)) and the record on appeal in this case is completely bereft of any evidence, admissible or otherwise, that Armstrong considered Thomasville as an acquisition prospect in any manner prior to Mr. Samuels' advising Armstrong of Thomasville's availability. In these circumstances, even if, contrary to fact and law, Mr. Samuels had been obligated to do more than inform Armstrong of Thomasville's availability, this Court would be compelled to conclude that performance of such an obligation had been frustrated by Armstrong's bad faith usurpation of his functions.

Nor is Armstrong's contention (Armstrong brief, p. 43) that "Mr. Finch was not interested in [Mr. Samuels'] proposal regarding affiliation with Armstrong" relevant to Mr. Samuels' right to recovery. Indeed, the suggestion is ludicrous as well as disingenuous. Mr. Finch's expression of disinterest to which Armstrong has reference occurred in January 1967

when Mr. Samuels broached the possibility of acquisition by Armstrong to him at the Chicago Furniture Show. While Mr. Finch did tell Mr. Samuels he had no interest in being acquired, he was at that very time in active negotiation with Armstrong and, in fact, had gone to Chicago directly from Armstrong's Lancaster, Pennsylvania, headquarters, where he and other Thomasville executives had met with Armstrong executives to discuss acquisition. Moreover, immediately after thus misinforming Mr. Samuels, Mr. Finch called Mr. Warnock to complain about the involvement of a finder. The simple point is that Mr. Samuels told Armstrong that Thomasville was available for acquisition and in fact Thomasville was available and Armstrong acquired it.

3. The trial court's refusal to grant a trial continuance was constitutionally improper. To be sure, trial continuances requested for such reasons as the unavailability of a party or a witness, for personal reasons, are ordinarily within the discretion of the district court, as Armstrong's brief (pp. 46-49) argues. And courts have held, as Armstrong states, that a party does not necessarily have a constitutional right to be present during a civil trial (Armstrong brief, p. 50).

But when, as in this case, the plaintiff is unable to attend trial because it falls on a religious holiday, which, as an orthodox Jew, he is required strictly to keep, the application of the usual discretionary standards must bend

to the constitutional guaranty of the free exercise of religion (United States Constitution, Amendment I). If it were otherwise, a man would be, as Mr. Samuels was, forced to choose between his religious convictions and his property interests. That such a decision should not and cannot be forced upon a litigant is clear by reference to the Supreme Court's rulings regarding other first amendment rights. In those areas, the High Court has declared unconstitutional various rules and standards applicable in situations not encompassed by the first amendment because of their chilling effect on the exercise of constitutionally guaranteed rights. E.g., New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964).

While there are limits to an individual's rights freely to exercise his religious beliefs, restrictions on such freedom have been permitted only where there is a "substantial threat to public safety, peace or order". Sherbert v. Verner, 374 U.S. 398, 403 (1963). Clearly, Mr. Samuels' observance of a religious holiday posed no such threat. In Smilow v. United States, 465 F. 2d 802, 804 (2d Cir.), vacated on other grounds, 409 U.S. 944 (1972), this Court, while holding that a witness's religious belief did not shield him from his obligation as a citizen to give grand jury testimony, observed in language having compelling application here:

"If appellant had refused to appear before the grand jury on the ground that he had been summoned to testify on a Jewish Holy Day, the

considerations would be different. Cf. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). Recognition of appellant's right to follow his religious beliefs would not then completely nullify society's interest in a thorough investigation. A postponement for a day or two would provide a feasible and sensible accommodation of individual and societal interests."

The postponement sought by Mr. Samuels would most certainly have been "a feasible and sensible accommodation of individual and societal interests" such as this Court contemplated in Smilow. Thus, not only was the trial court's refusal to grant Mr. Samuels' request an abuse of discretion, for the reasons advanced in Mr. Samuels' main brief at pages 49-53, but it was in any event constitutionally impermissible.

Conclusion

For the foregoing reasons, and the reasons set forth in Mr. Samuels' main brief, the part of the judgment appealed from must be reversed.

January 10, 1975.

Respectfully submitted,

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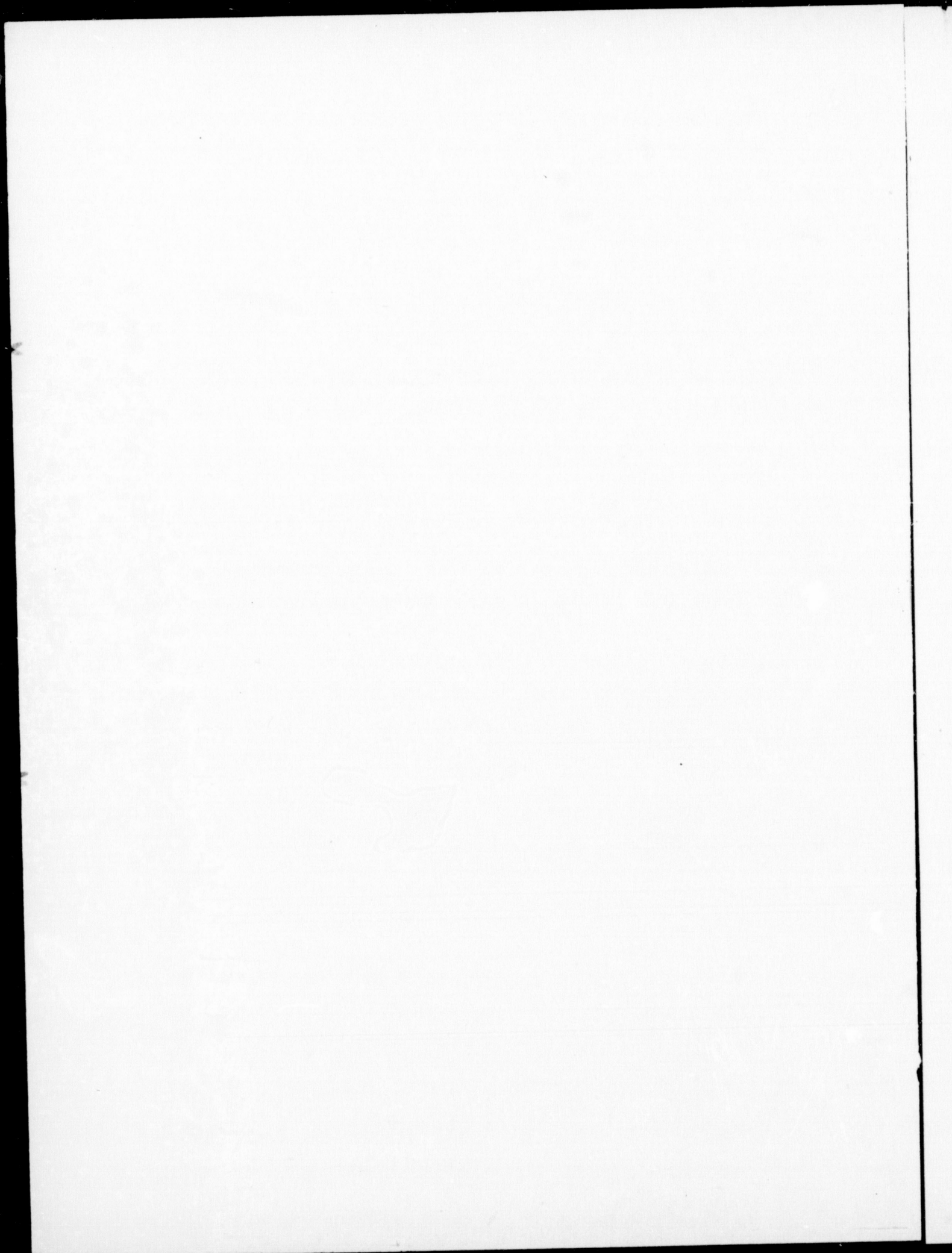
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Addendum

United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



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